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In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 760

ESTATE OF JOHN SAGE, DECEASED, ALFRED D. SAGE, ROBERT J. RENDALL AND THE FIFTH AVENUE BANK OF NEW YORK, PETITIONERS

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 33–39) [1] is reported in 42 B. T. A. 1304. The opinion of the Circuit Court of Appeals (R. 79–87) is reported in 122 F. (2d) 480.

[1] Since the record has not been separately printed, the record references are to those portions of the record appearing in the appendix to the petitioner's brief in the Circuit Court of Appeals.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered June 27, 1941 (R. 87–88). On September 18, 1941, an order was entered extending the time within which petition for a writ of certiorari might be filed for a period of sixty days from September 27, 1941. The petition for a writ of certiorari was filed November 25, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the deduction allowable for a residuary bequest to charity under Section 303 (a) (3) of the Revenue Act of 1926, as amended, should be reduced by the amount payable to the decedent's widow by the residuary legatee under a compromise agreement between the widow's guardians and the legatee.

STATUTES INVOLVED

The statutes involved are set forth in the Appendix, *infra*, pp. 9–11.

STATEMENT

The Board adopted the stipulated facts as its findings, which are as follows (R. 34–36):

John Sage, a resident of Bergen County, New Jersey, died testate on October 11, 1936. He left a widow who was adjudged an incompetent on December 21, 1936. Her brother, John Tonnessen,

and her sister, Sadie Weiss, were appointed guardians by the Bergen County Orphans' Court and they continued to act in that capacity until discharged on March 22, 1938 (R. 34).

The decedent left an estate of approximately $450,000. To his widow, he bequeathed his household effects and legacies totaling $42,000. The residuary estate was bequeathed to the Lord Provost of Glasgow, Scotland, to be devoted to the care and maintenance of the disabled soldiers and sailors of the British Army and Navy according to his best judgment (R. 34).

The decedent's will was first offered for probate in a Surrogate's Court in New York but on the objections[1] of the widow's guardians the proceedings were dismissed and the Surrogate ordered the will to be sent to Bergen County, New Jersey (R. 34–35), where it was offered for probate on or about April 9, 1937.

On May 8, 1937, John Tonnessen and Sadie Weiss, as the guardians of the decedent's widow, entered into an agreement with the Lord Provost of Glasgow, Scotland, through his attorney in fact, Thomas A. S. Beattie, which provided that the widow's guardians would consent to the probate of decedent's will as a competent instrument to pass his real and personal property and that the Lord Provost would pay to decedent's widow a

[1] The objections were to the probate of the instrument as the last will and testament of the decedent (R. 37).

sum equivalent to 25 percent of the amount received by him under the provisions of decedent's will. The executors were not parties to this agreement and it was not incorporated in or made a part of the probate proceedings (R. 35). Upon the petition of the guardians of the widow, however, it was approved by the order of the Bergen County Orphans' Court.

Decedent's will was admitted to probate on May 19, 1937. On the same day letters testamentary were issued to the executors, who immediately thereafter undertook administration of the estate. On or about December 1, 1937, the executors filed their final account with the Bergen County Orphans' Court and on January 11, 1938, the court made a decree allowing the account. The decree showed a balance of $175,750.48, after payment of specific and general legacies and allowances, and payment of all commissions, counsel fees, and other disbursements. Thereafter, the executors filed a petition with the Orphans' Court praying for a decree of distribution and such decree was entered on February 9, 1938. It directed that the entire balance on hand be paid to the Lord Provost of Glasgow, Scotland, as residuary legatee. Neither this decree nor that allowing the account provided for any payment or payments to decedent's widow or her guardians (R. 35–36).

The State of New Jersey assessed transfer inheritance taxes upon the entire residuary estate

as a charitable and public bequest, pursuant to the statutes and decisions of that state, and no part or portion thereof was taxed to decedent's widow (R. 36).

In the federal estate tax return the executors claimed a deduction for the full amount of the residuary estate, as a charitable and public bequest. On or about January 5, 1939, in determining the deficiency, the Commissioner disallowed one-fourth of the claimed deduction on the theory that under the terms of the agreement the amount payable by the Lord Provost to the widow passed from the decedent to the widow and not from the Lord Provost to the widow. The Commissioner determined a deficiency in the sum of $9,687.66 (R. 36).

The Board of Tax Appeals approved the Commissioner's determination (R. 40).

The Circuit Court of Appeals affirmed the Board's decision (R. 87–88).

ARGUMENT

1. The question raised in this case is settled by *Lyeth* v. *Hoey,* 305 U. S. 188. In that case the Court held that the property received by the taxpayer from the estate of his deceased grandmother in compromise of his claim as heir was received by inheritance and so was not subject to income tax. The Court also indicated that the term "inheritance" should be given the same meaning for estate tax purposes as for income tax. 305 U. S. at 194–195. It follows that here the decedent's

widow took by inheritance the amount paid her under the compromise agreement. Necessarily, therefore, that same amount did not pass by inheritance to the charity and was rightly excluded from the deduction.

2. There is no conflict among the circuits; the only courts which have considered the question have reached the same conclusion as the court below. See *Thompson* v. *Commissioner* (C. C. A. 2d), decided November 17, 1941, not yet officially reported, and *Heim* v. *Nee* (W. D. Mo.), decided May 28, 1937, not officially reported, but found in 19 A. F. T. R. 1318, or 1937 C. C. H., Vol. 4, 9371.

It is true that in *Robbins* v. *Commissioner,* 111 F. (2d) 828 (C. C. A. 1st), the court declined to give any weight to a compromise agreement, but that case does not conflict with the decision below. There, an heir had contested the will and a compromise agreement was substituted giving the charity a specific remainder interest in lieu of its designation under the will as beneficiary under a power of appointment. The only issue was whether the original want of certainty that a gift in any but a nominal amount would be made to the charity, could be supplied after death by the compromise settlement so as to permit a deduction for a charitable bequest. No question was presented as to the manner in which a contestant succeeds to the consideration paid him or of the effect of the pay-

ment in measuring what is inherited by the beneficiary who made the payment.

There is a second difference between the *Robbins* case and the decision below. In the present case the bequest was to a trustee. But Section 303 (a) (3) of the Revenue Act of 1926, as amended (Appendix, *infra,* p. 10), permits a deduction—

> * * * only if such contributions or gifts are to be used by such trustee or trustees, or by such fraternal society, order, or association, *exclusively* for religious, charitable, scientific, literary, or educational purposes, or for the prevention of cruelty to children or animals. * * * [Italics supplied.]

Since the Lord Provost was obligated prior to the receipt of the legacy to turn over 25% to the widow, it is clear that he could not use it exclusively for religious, charitable, etc., purposes, and that a deduction in the full amount of the legacy would therefore be improper.

3. Our position is not contrary to the well established rule that the estate tax is imposed on the interest which ceases at death. While the date of death is determinative for certain purposes, there are others for which subsequent events must be taken into account. For example the computation of the net estate depends in part on items unknown at death, such as funeral expenses, and administration costs. Similarly, it cannot then be known

whether the will will be admitted to probate or what charitable bequests will pass thereunder. By the time the will is admitted to probate, it may happen, as in the instant case, that interested parties have made an agreement which in effect modifies the will and actually decreases the amount which the charity receives and retains for its own uses. Obviously by entering into such an agreement, the parties cannot acquire a status not recognized by the state law or the will at the date of the decedent's death but they can shift the amounts to be paid to various legatees. If additional sums are paid to one who has standing as an heir, they go to him by inheritance and should be a part of the decedent's net estate even though they come out of a portion which might otherwise have gone to charity.

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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DECEMBER 1941.